SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

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MICHAEL RODAK, JR., CLE

OCTOBER TERM, 1973

NO. 73-829

MIREE TOLBERT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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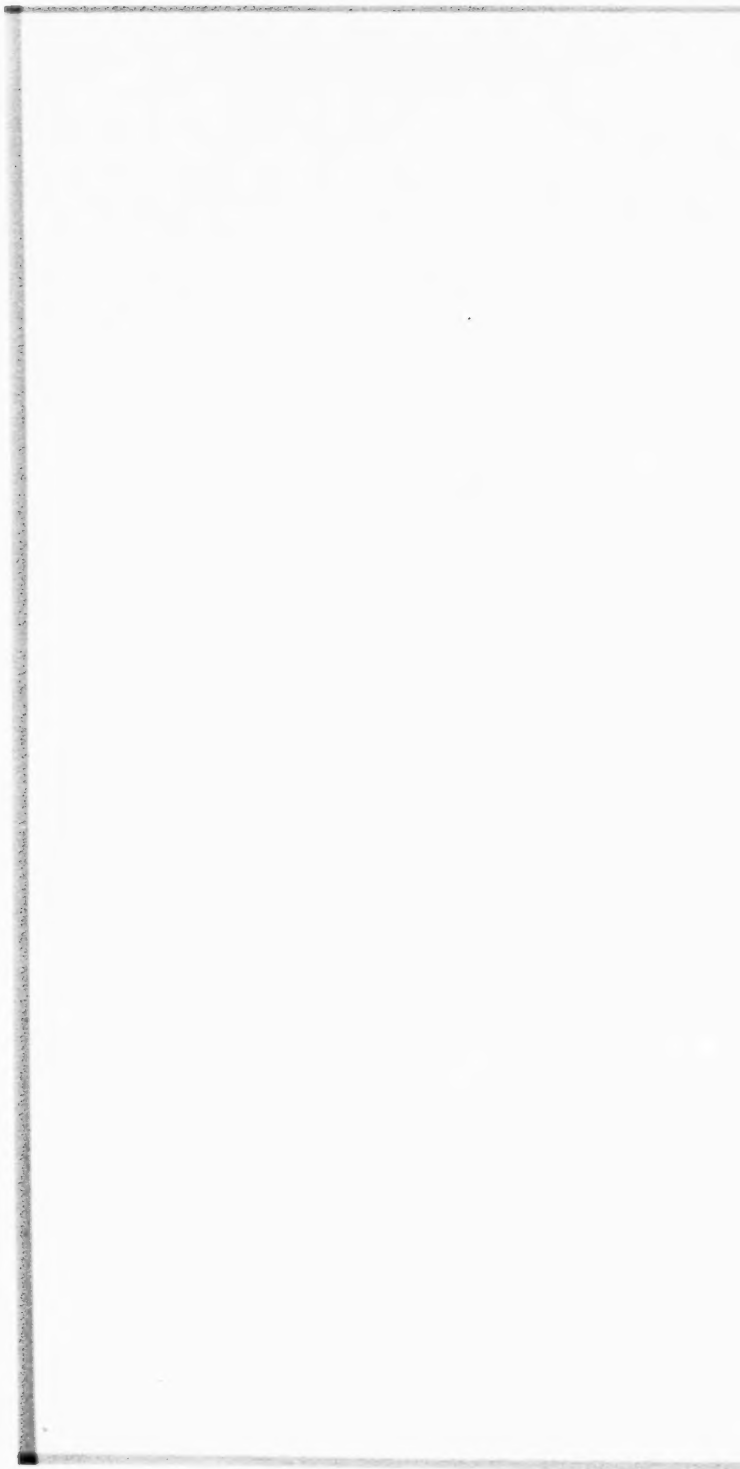

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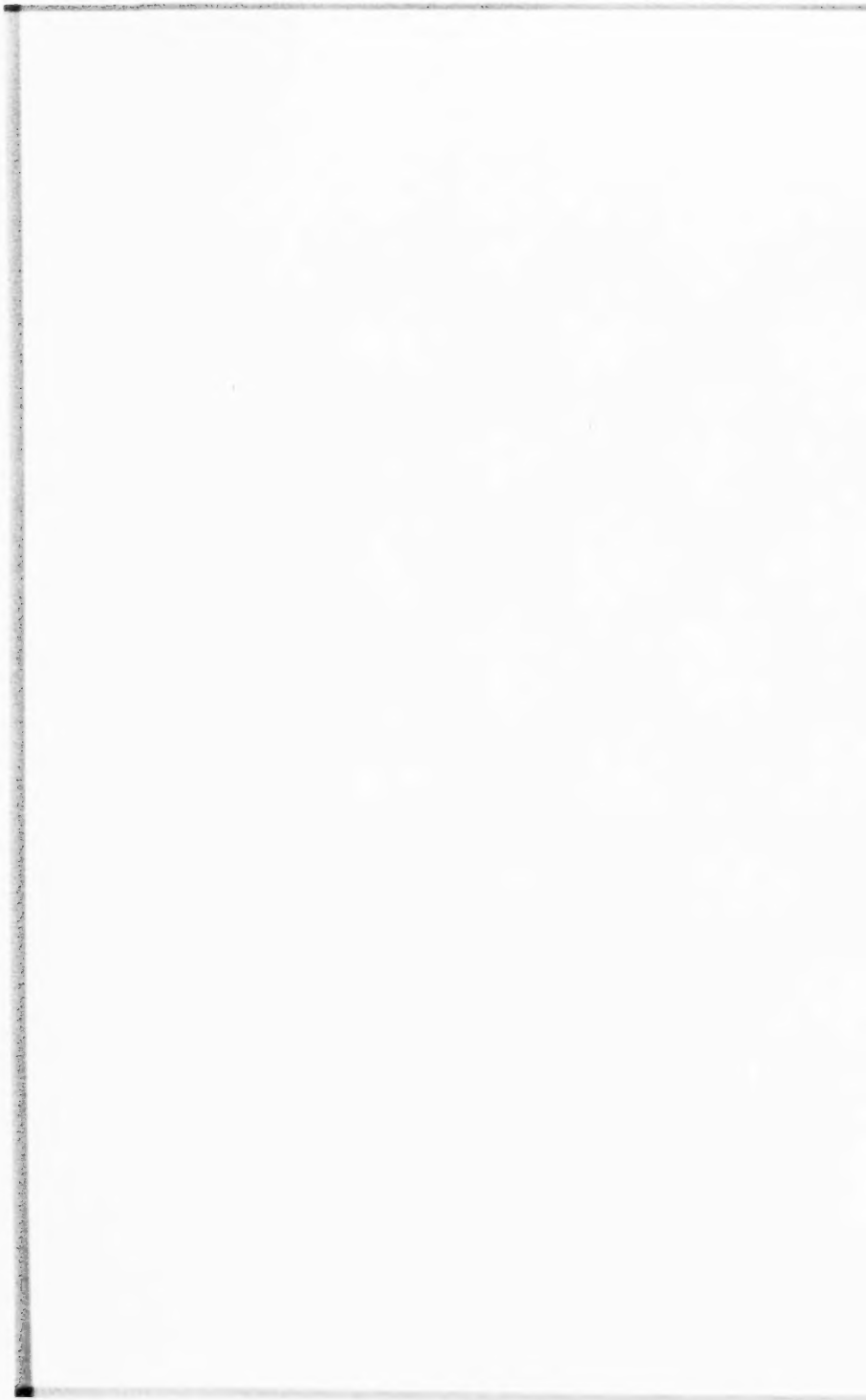

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No._____

MIREE TOLBERT, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, MIREE TOLBERT, JR, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for the Southern District of California,

sentencing Petitioner to one year and a day in prison.

This case squarely presents the issue of the right of immigration officers to search a vehicle at a stationary border checkpoint, similar to the same issue before this Court in Condrado Almeida-Sanchez v. United States of America (No. 71-6278). This counsel filed an Amicus Curiae Brief in support of the Petitioner in that case. Moreover, the checkpoint in the present case was 67 miles from the Mexican border and on the major north-south highway in California and the West Coast. Finally, the arguments in this case, (see Argument III) transcend and are different than those presented in the briefs for Petitioner and Respondent in Almeida-Sanchez and should be evaluated so that the legitimacy of the stationary border checkpoint inquiry can be soundly determined.

OPINION BELOW

Trial in the Federal District Court was by Court.

The Opinion of the Court below is appended hereto as Appendix "B" and is also found in the Clerk's Record of the Circuit Court. The Opinion of the Court on the Petition for Rehearing is appended hereto as Appendix "C". The judgment of the Court below is appended hereto as Appendix "D". A copy thereof also appears in the Clerk's Transcript from the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is August 8, 1973 (R.C.A. Judgment). Petition for Rehearing denied October 4, 1973.

The Statutory Provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I

THE EXCEPTION ALLOWING WARRANTLESS SEARCHES UNDER 8 U.S.C. § 1357(a) AND DEFINED BY REGULATION 8 C.F.R. § 287.1(a) (2) CONTRAVENES PROTECTIONS AFFORDED BY THE FOURTH AMENDMENT.

A./ No apparent reason exists why Fourth Amendment principles do not apply with the same force to searches of automobiles for smuggled aliens as they do to similar searches for smuggled merchandise. The Trial Court erred in basing its evidentiary ruling upon this distinction.

II

THERE WAS NO PROBABLE CAUSE TO JUSTIFY THE DETENTION OR SEARCH OF APPELLANT'S VEHICLE AT SAN ONOFRE.

A./ There is no rational justification for allowing 8 U.S.C. § 1357(a) to serve as a blanket exception to the Fourth

Amendment requirement of probable cause.

III

THIS COURT MUST IN ACCORD WITH ITS CONSTITUTIONAL DUTY TO ANNUL STATUTES AND REGULATIONS VIOLATIVE OF THE CONSTITUTION STRIKE DOWN THIS UNWARRANTED GOVERNMENT BID FOR LEBENSRAUM AS IMPLEMENTED BY GOVERNMENTAL REGULATIONS RESCINDING THE SEARCH AND SEIZURE RIGHTS OF OUR CITIZENS DENYING THEM EQUAL PROTECTION OF THE LAWS, ABRIDGING THEIR RIGHT TO TRAVEL, COMPRESSING THEM INTO THE REFUGE OF MIDDLE AMERICA, DETERRING LAW ABIDING MIDDLE AMERICANS FROM SEEKING EMPLOYMENT OR ENJOYING VACATIONS NEAR OUR NATION'S BOUNDARIES, AND OBSTRUCTING FREEDOM OF INTERSTATE COMMERCE.

IV

THE SEARCH OF PETITIONER'S PERSON RESULTING IN THE DISCOVERY OF A REGISTRATION SLIP AND TOW SERVICE LISTINGS FROM THE YELLOW PAGES OF A TELEPHONE BOOK CEMENTING THE CASE AGAINST HIM WAS VIOLATIVE OF THE FOURTH, FIFTH AND NINTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

V

THE FACT THAT PETITIONER'S CAR WAS IN A STATE OF LIMITED BAILMENT MAKES THIS A CASE OF FIRST IMPRESSION AND JUSTIFIES THIS COURT'S UNDERTAKING TO DECIDE WHETHER THAT STATE OF BAILMENT PRECLUDED PETITIONER FROM OBJECTING TO THE SEARCH AND SEIZURE. THE DRIVER CONSENTED UNDER COERCION AND UNDER SUBMISSION TO AUTHORITY THEREBY RENDERING THE SEARCH INVALID.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the First, Fourth, Fifth, and Ninth Amendments to the United States Constitution, 21 U.S.C. 841(a), 8 U.S.C. 1357 (a) and 8 C.F.R. 287.1(a) (2).

STATEMENT OF THE CASE

An indictment was filed in the Federal District Court for the Southern District of California accusing Petitioner, Miree Tolbert, Jr., with violating 21 U.S.C. § 841(a) (1) (possession of a controlled substance with intent to distribute). Appellant was arraigned and entered a plea of not guilty.

On December 4, 1972, a hearing was held under Rule 41(e) of the Federal Rules of Criminal Procedure to determine whether to suppress the marijuana found in Petitioner's vehicle after a border checkpoint search at San Onofre and papers linking him with the car found on his person after his arrest. The motion to suppress was denied. (R.T. 5-17).

Ultimately, on January 30, 1973, the case was submitted on the testimony adduced at the hearing on the motion to suppress and the defendant was found guilty. (R.T. 23-25).

On March 19, 1973, after a pre-sentence report had been prepared, the Petitioner was

sentenced to a year and one day in custody. A Notice of Appeal was timely filed and Petitioner was permitted to remain at liberty on a corporate surety bond of $3,500. (R.T. 33-34).

Appellant's Brief was filed in the Ninth Circuit Court of Appeals and oral argument was heard. On August 8, 1973, the Court rendered the opinion attached as Exhibit "B". A Petition for Rehearing En Banc was timely lodged and denied on October 4, 1973 (See Appendix "C").

STATEMENT OF FACTS

The sole issues in the case relate to alleged illegal searches and seizures. The evidence at the hearing on the motions to suppress the marijuana (the controlled substance which Tolbert allegedly possessed) and the documents found on his person linking him to the vehicle carrying the contraband follows:

John Bagley testified that on September 24, 1972, he was employed as a United States Border Patrol Agent working the border patrol checkpoint approximately four miles south of San Clemente on Interstate 5. The checkpoint is 67 miles above the Mexican border and is often called the San Onofre checkpoint. It is the principal artery for travel between San Diego and cities to the north such as Los Angeles, San Francisco, etc. (R.T. 6-7, 14). At about 12:45 P.M. he observed a tow-truck towing a white Chevrolet coming into the inspection station. He had the driver open the trunk to the car he was towing. The driver

claimed that he did not have a key to the car trunk. Justus was told that he would be detained until the truck was examined. The trunk was invaded by ripping off the canvas that led to it from the backseat. The trunk contained packaged marijuana. Justus was arrested and handcuffed. Justus stated he was towing the car to San Clemente. In his pocket was a piece of paper saying "Tow to San Clemente". He stated that he was being led or followed by a black man in a 1972 green Pinto. (R.T. 7-11). The agent and Justus proceeded up the highway until Justus pointed out a 1972 Pinto going east off of a bridge and travelling toward the agent and his arrestee. The agent halted the other car, "took the driver out of the car and placed him under arrest". Petitioner was the driver. He was immediately searched which resulted in the discovery of a registration to the car towed by Justus in his wallet. Also found on Petitioner's person was a telephone book from the

yellow pages listing several towing services in the area. (R. T. 11-13).

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

I

THE EXCEPTION ALLOWING WARRANTLESS SEARCHES WITHOUT PROBABLE CAUSE UNDER 8 UNITED STATES CODE § 1357 (a) AND DEFINED BY REGULATION 8 C.F.R. § 287.1 (a) (2) CONTRAVENES PROTECTIONS AFFORDED BY THE FOURTH AMENDMENT.

We are faced with a rule in the United States 9th Circuit Court of Appeals, which stands in conspicuous opposition to the constitutional protections generally provided by the Fourth Amendment. Those protections threatened by this rule are based on probable cause, are"... per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions" (Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967). The exception challenged here is not well delineated, nor have the cases demonstrated any rational grounds behind its establishment.

A. NO APPARENT REASON EXISTS WHY FOURTH AMENDMENT PRINCIPLES DO NOT APPLY WITH THE SAME FORCE TO SEARCHES OF AUTOMOBILES FOR SMUGGLED ALIENS AS THEY DO TO SIMILAR SEARCHES FOR SMUGGLED MERCHANDISE. THE TRIAL COURT ERRED IN BASING ITS EVIDENTIARY RULING UPON THIS DISTINCTION.

Petitioner contends that absent any showing that an international boundary was crossed, or that Petitioner was under surveillance, the search without probable cause was not, and cannot be legitimized as a border search. Under the authority of 8 U.S.C. 1357, Immigration and Naturalization Service Officers have the right to search automobiles for illegal aliens within a reasonable distance of an international border to prevent the illegal entry of aliens provided there is probable cause for so doing. Cervantes v. United States, 263 F. 2d 800 (9th Cir. 1959) However, once it has been established that

an individual has previously crossed an international border and is not presently under surveillance or pursuit, a search conducted seventy miles from the Mexican border, as in the case at bar, does not constitute a border search and is not justified absent probable cause. Thus, the Ninth Circuit Court of appeals has held that the search of an automobile seventy miles from the nearest port of entry cannot be justified as a border search, but must be supported by probable cause. Cervantes v. United States, supra. In the Cervantes case, a Federal customs investigator for the United States Customs Service had received information on two occasions from an informant describing the defendant and his several entries into Mexico for purchases of narcotics. Moreover, the investigator observed the defendant and his vehicle in Tijuana, Mexico, and, after checking defendant's license number, determined that the defendant had previous narcotics convictions, including one for unlawful transportation of narcotics

into the United States. This information was given to border inspectors and the investigator requested that the automobile and its occupants be thoroughly searched. On that same date, defendant crossed the international border at Tijuana without being searched by the border inspectors and proceeded north on U. S. 101 toward Los Angeles. Federal Immigration agents at San Clemente, being in possession of the aforedescribed information, stopped the defendant and, after searching the defendant and the vehicle, arrested him for importing, transporting and concealing narcotics The Ninth Circuit, in reversing defendant's conviction for lack of probable cause to stop and search defendant's vehicle at San Clemente, included the following remarks in a footnote regarding the Government's contention that the Court could sustain the search as a border search:

"An authorized federal border official may, upon unsupported suspicion, stop and

search persons and their vehicles entering this country . 19 U.S.C.A. Sec. 482. Carroll v. United States, supra, 267 U.S. at Pages 153-154, 45 S. Ct. at Page 285.

But after entry has been completed, a search and seizure can be made only on a showing of probable cause. Landau v. United States, 2 cr., 82 F2d 285, 286; United States v. Lee Ngee How, D.C. 105 F. Supp. 517, 523. The record does not reveal the elapsed time between Cervantes' re-entry into the United States on December 8, 1955, and his arrest at San Clemente. However, we take judicial notice of the fact that San Clemente is more than seventy miles from the nearest port of entry from Mexico. There is no indication in the record that Cervantes had stopped at San Clemente in connection with a pursuit. Insofar as the record reveals, therefore, his entry had been completed prior to the time he reached San Clemente, and the government does

not contend otherwise." Cervantes v. United States, 263 F.2d 800, 803, n. 5 [Emphasis added].

It is submitted that in the case at bar, the factual circumstances surrounding the detention of Petitioner's car and the search of his vehicle at San Clemente demonstrate that the grounds for searching the vehicle are far more tenuous than those in the Cervantes decision and that, therefore, absent independent probable cause for detaining and searching defendant's vehicle, and evidence sought to be introduced be suppressed as not incident to a valid international border search. See, also, United States v. Hortze, 179 F. Supp. 913, 918 (D.C. Calif. 1959). To conclude otherwise, not only the Petitioner, but all residents of San Diego, or indeed, visitors who travel northbound to other parts of California would by virtue of travelling on Interstate Highway 101, surrender their Constitutional protection against unreasonable searches and seizures; and this is true

whether or not the persons involved ever crossed the border. Petitioner did not! Such an argument is certainly fatuous and invalid.

Respondent in his trial brief in opposition to our earlier motion to suppress unctuously stated: "Defendant in his moving brief has confused the different rules for searches for contraband and searches for aliens in his attempt to graft the probable cause standards of the narcotics cases (Cervantes) onto the the rules justifying immigration inspections."

Justice Browning, in his dissenting opinion in Almeida-Sanchez, (prior to this Court's decision) vehemently shares our continuing "confusion".

"If a reason exists for distinguishing searches for aliens from searches for merchandise, no one - including this court - has yet suggested what it might be. Nothing in the words of the Constitution supports the distinction, and no one suggests that the public interest in excluding inadmissible aliens is greater than that in excluding narcotics and

and other contraband." United States v. Almeida-Sanchez, 452 F.2d 459 (1971). We, therefore, continue to assert the applicability of Fourth Amendment protections to the present case, despite the absurd application of 8 U.S.C. Section 1357(a) which threatens to deny those protections. If the rational distinction which Judge Browning as well as Petitioner fail to find, exists, we demand to know what it is before Petitioner abandons the assertion of rights Constitutionally protected by the Fourth Amendment.

II

THERE WAS NO PROBABLE CAUSE TO JUSTIFY THE DETENTION OR SEARCH OF PETITIONER'S VEHICLE AT SAN CLEMENTS.

No reason was given by the Federal Immigration Agents for detaining Petitioner's car indicating their intention to search his vehicle without first procuring a search warrant. First, unlike in United States v.

Haith, 297 F. 65 (4th Cir. 1961), Cert. den. 369 U.S. 804, 82 S. Ct. 643, and United States v. Wilson, 159 F. Supp. 149 (D.C. Ala. 1957), Cert. den. 358 U.S. 865, 79 S. Ct. 97, the Federal Immigration Agents in the case at bar, had no knowledge or information pertaining to Petitioner's reputation, nor did they smell any odor emanating from his vehicle sufficient to justify their search. Second, unlike in United States v. Walker, 307 F.2d 250 (4th Cir. 1962), the agents had had no previous observations of the Petitioner engaged in illegal activity, nor did they have any reliable information from an informant linking Tolbert with illegal activity.

As discussed in Part IA, supra, far more compelling arguments in Cervantes than are present in Petitioner's case, were ruled insufficient to establish probable cause. (See also, People v. Gale, 46 Cal. 2d 253, 294 P. 2d 13 (1956) (Damage to vehicle insufficient justification for border search of vehicle leaving the United States).

In fact, the question of whether probable cause existed which would justify the detention and threatened search, is of no moment here since the Trial Judge validated the agent's authority under this Court's decisions permitting unrestricted searches of automobiles at border checkpoints.

A/ THERE IS NO RATIONAL JUSTIFICATION FOR ALLOWING 8 U.S.C. SECTION 1357 (a) TO SERVE AS A BLANKET EXCEPTION TO THE FOURTH AMENDMENT REQUIREMENT OF PROBABLE CAUSE.

In further stressing the absurdity of 8 U.S.C. Section 1357 (a) which allows warrantless searches without probable cause, Petitioner urges the Court to note that the judicial trend is in the opposite direction, i.e., toward a narrowing of exceptions which allow warrantless searches toward strict enforcement of the probable cause requirement, and to a narrowing of the scope of searches to eliminate the obtrusive "exploratory" search.

For example, Coolidge v. New Hampshire, (1971) 403 U.S. 443, 91 S. Ct. 2022, limited the Chambers Rule which allowed warrantless searches of vehicles (with probable cause) in motion when seized. This undeniably represents the Court's wish to limit the exception of the "movable auto" exigency. Yet, under 8 U.S.C. Section 1357, and under the guise of a search for "aliens", any auto within 100 miles of an external boundary could be searched without a warrant in possible violation of Coolidge, and without probable cause in violation of the Supreme Court mandate in both Coolidge and Chambers. Section 1357 potentially renders such cases meaningless.

Further, the probable cause requirement has been held subject to limitations dictated by alleged criminal activity, and by the "reasonable" expectations of the officers under the circumstances. In People v. Superior Court (Kiefer), 3 Cal. 3d 807, 91

Cal. Rptr. 729 (1970), the Court stated that even when there is probable cause to arrest, a search for weapons must remain "reasonable in scope".

> "Just as the arresting officer in an ordinary traffic violation case cannot reasonably expect to find contraband in the offender's vehicle, so also he cannot expect to find weapons ... would likewise constitute an 'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile. It follows that a warrantless search for contraband must be predicated ... on specific facts or circumstance giving the officer reasonable grounds to believe that such weapons are present in the vehicle he has stopped." (3 Cal. 3rd at 829, 91 Cal. Rptr. at 744).

Indeed, very recently in California, the limitation of scope of search incidental to

arrest articulated in Chimel v. California (1969) 395 U.S. 752, 89 S. Ct. 2034 has been applied to searches of automobiles. (People v. Koehn, 102 Cal. Rptr. 102, May, 1972). These decisions dictate that a search without a warrant can be conducted in a non-emergency situation, only if the search coincides with a lawful arrest or detention, and is restricted to the arrestee's person or area "within his immediate control" (395 U.S. at 762-2). Yet, under Section 1357, no warrant is required, no probable cause, no lawful arrest and no restriction of scope of search. One has only to "look for" aliens, and the Fourth Amendment protections supported by the above decisional law vanish.

Other cases have limited the use of "furtive gestures" as a basis for probable cause to search. (Gallik v. Superior Court of Santa Clara County, 5 Cal. App. 3d 862, 97 Cal. Rptr. 693 (1971); People v. Cassel, 23 Cal. App. 3d 715, 100 Cal. Rptr. 520 (1972), People v. Williams, 20 Cal. App. 3d

590, 97 Cal. Rptr. 815 (1971)). That limitation is meaningless if the probable cause requirement is abandoned.

Finally, the courts in California have tried to put a halt to the more obvious abuses of the authority of the police to "inventory" the contents of automobiles lawfully in their custody pursuant to the removal and storage provisions of the vehicle code. (Mozzetti v. Superior Court, 4 Cal. App. 3d 699, 94 Cal. Rptr. 412 (1971); see also, People v. Heredia, 20 Cal. App. 3d 194, 97 Cal. Rptr. 488 (1971) (Mozzetti rule not merely prospective in effect); Virgil v. Superior Court, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968)).

In Mozzetti, there was no arrest, nor probable cause. The Court saw no rational grounds for diluting Fourth Amendment protection namely for "inventory" purposes.

The Court in Koehn,quoted the following from Justice Stewart's opinion in Coolidge:

"... the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears". Coolidge v. New Hampshire, supra, 91 S. Ct. 2022, 2035).

Following Mozzetti, the word "inventory" may no longer serve as the catalyst disintegrating the Fourth Amendment protections. Unfortunately, one such "talisman" remains: the word "alien". Petitioner strongly denies existence of any rationale for this exception. He rightfully demands an explanation before he submits to what can now only be termed a blatant disregard of his Fourth Amendment rights under the constitutionally invalid mandate of 8 U.S.C. Section 1357.*

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* The Ninth Circuit Court of Appeals has itself made inroads on the Carte Blanche justification for even border searches. See Henderson v. United States (9th Cir. 1967), 390 F.2d 805. (Probable cause essential to support search of body cavities).

III

THIS COURT MUST IN ACCORD WITH ITS CONSTITUTIONAL DUTY TO ANNUL STATUTES AND REGULATIONS VIOLATIVE OF THE CONSTITUTION STRIKE DOWN THIS UNWARRANTED GOVERNMENTAL BID FOR LEBENSRAUM AS IMPLEMENTED BY GOVERNMENTAL REGULATIONS RESCINDING THE SEARCH SEIZURE RIGHTS OF OUR CITIZENS, DENYING THEM EQUAL PROTECTION OF THE LAWS, ABRIDGING THEIR RIGHT TO TRAVEL, COMPRESSING THEM INTO THE REFUGE OF MIDDLE AMERICA, DETERRING LAW ABIDING MIDDLE AMERICANS FROM SEEKING EMPLOYMENT OR ENJOYING VACATIONS NEAR OUR NATION'S BOUNDARIES, AND OBSTRUCTING FREEDOM OF INTERSTATE COMMERCE.

It has been clear since Marbury v. Madison, 1 CRANCH 137 (1804) that Congress can neither make nor enforce a law, rule, or regulation which is counter to the United States Constitution. This principle is the bedrock of our form of government, yet Congress and State Legislatures and Adminis-

trative agencies, have sometimes overstepped the bounds of our Constitution. It is the Judiciary's duty to be watchful for citizen's rights. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524 (1886). When a person brings a proper case complaining of infringements of constitutional rights, the judicial branch of our Government must ascertain the validity of suspect laws passed by our legislative bodies, and at least as great a duty exists when administratively passed regulations are challenged. Individuals must be protected from both willful and unwitting encroachment upon their constitutional rights. "This duty cannot be discharged as though it were a mere procedural formality." Von Moltke v. Gillies, 332 U.S. 78, 68 S. Ct. 316. It must be thoroughly and thoughtfully considered. Here by the stroke of a pen, the Government has eliminated Fourth Amendment protections for a majority of our 200 million citizens. (See Appendix A). One of the laws here in question, 8 U.S.C. 1357 (a), allows searches

of vessels and vehicles for aliens with no need of obtaining a search warrant and without even probable cause, as long as within a "reasonable distance" of an external boundary. Implementing this law is 8 C.F.R. 287.1(a) (2), which defines "reasonable distance" as 100 air miles from any external boundary. Recent cases have accepted these laws more by rote than by reason. An example was United States v. Almeida-Sanchez, 452 F.2d 459 (1971) subsequently reversed by this Court.

Here, the Court must not only analyze the ends of the 8 U.S.C. 1357 (a) and 8 C.F.R. 287.1(a)(2) but must also examine their means to determine if they comport with constitutional standards.

In similar legislation, 19 U.S.C. 482, Congress literally authorized searches for foreign contraband anywhere in the United States without either a search warrant or probable cause. The courts, doing their duty, have understandably balked at such

broad authorization and have required probable cause to search unless it is a border search. Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959).

If these rules are upheld, the people of the following cities, Seattle, San Francisco, Los Angeles, San Diego, Phoenix, San Antonio, Houston, New Orleans, Miami, Baltimore, Philadelphia, Pittsburgh, New York, Buffalo, Cleveland, Columbus, Detroit, and Washington, D.C. (cities in excess of 500,000 people) plus the entire population of the states of Florida, Delaware, New Jersey, Connecticut, Rhode Island, Maine, New Hampshire, Vermont and Hawaii, 59 million people, can be stopped and their vehicles searched without probable cause, and as the law is stated, without any justification. If we were to further include cities of less than one-half million people, we would learn that the preponderant majority of Americans are subject to the loss of their search and seizure rights under existing legislation.

(See Appendix "A").

The right to be free from unreasonable searches and seizures is inextricably interwoven into the fabric of our society. Yet, the Government has arbitrarily chosen, 100 miles from an external boundary as a "no Fourth Amendment Rights" zone. In this zone, Government agents can take away Fourth Amendment protections when riding in vehicles.

Chief Justice Taft in Carroll v. United States, 267 U.S. 132, 153-154, 45 S. Ct. 280, 285, (1925) said:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official

authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise .." (Emphasis added).

Furthermore, 8 U.S.C. 1357(a) and 8 C.F.R. 287.1(a)(2) read together, run afoul of the equal protection provisions of the Fifth Amendment. Distance from the beach or any other external boundary should not be a criterion for determining the extent of one's constitutional rights. The residents of Miami cannot be afforded lesser constitutional rights than the residents of Kansas City. It amounts to an "invidious discrimination" of the most rank sort. See e.g. McLaughlin v. Florida, 379 U.S. 184, 190, 194, 85 S. C. 283 (1964); Douglas v. California, 372 U.S. 353, 356, 83 S. Ct. 814 (1963); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 110 (1942). These laws also inhibit the right to travel. Travel restrictions within the United States were struck down long ago. In Kent v. Dulles,

357 U.S. 116, 125-126, 78 S. Ct. 1113, 1118, (1958). Justice Douglas stated for the Court:

> "The right to travel is a part of the 'liberty' of which citizens cannot be deprived without the due process of law under the Fifth Amendment ... In Anglo-Saxon Law, that right was emerging at least as early as the Magna Carta .. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. ... travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."

Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659 (1964), Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271 (1965).

Justice Stewart reiterated the fundamental right in United States v. Guest, 383 U.S.

745, 757-758, 86 S. Ct. 1175, 1778 (1966):

"The constitutional right to travel ... occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

In the landmark decision of Shapiro v. Thompson, 394 U.S. 618, 629-630, 89 S. Ct. 1322, 1329 (1969) Justice Brennan declared for the majority:

"This court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the

Passenger Cases, 7 How. 283, 492, 12 L. Ed. 702 (1849)."

Clearly in the present case, the government has unreasonably, and without justification, burdened the right to travel. See also Edwards v. California, 314 U.S. 160, 62 S. Ct. 164 (1941), Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659 (1964), Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271 (1965). The regulations here in question will put a chill on the choice of where to travel. If every midwesterner feared the possibility of searches at any time without probable cause, he would certainly be deterred from travelling to or near any external boundary. "Wherever a man may be, he is entitled to know that he will remain free fron unreasonable searches and seizures". Katz v. United States, 389 U.S. 347, 359, 88 S. Ct. 507, 515 (1967). It has therefore, been undeniably established that the right to travel is a "fundamental" constitutional right. We recognize that freedom of travel, like free-

dom of speech, may be subject to reasonable limitations as to time and place. The Government, if not the Court, may take comfort in the fact that existence of a "compelling governmental interest" necessary to justify infringement of a fundamental constitutional right finds precedent in the notorious, if not celebrated case of Korematsu v. United States, 323, U. S. 214, 65 S. Ct. 193 (1944). Though the Court has been understandably reluctant to refer to Korematsu, the case held that:

> "The liberty of every American citizen freely to come and go must frequently, in the face of sudden danger, be temporarily limited or suspended." (323 U.S. at 231), See also Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375 (1943).

Here was justification for the internment of thousands of Japanese, 80% of whom were American citizens by birth. Where is the 'sudden danger' which could justify the pre-

sent restriction? A rising crime rate? The war in Vietnam? Very obviously, no exigency exists as justification.

Further, Justice Roberts dissented in Korematsu from what he considered too broad a restriction on the right to travel. At least a temporal limitation was inherent in that situation. The right to travel under a literal reading of Section 1357 (a), on the other hand, is restricted indefinitely. The overbreadth of Section 1357 (a) and lack of a compelling governmental interest to justify the blatant infringement of the fundamental right to travel, demand that it be ruled unconstitutional.

This inhibiting of the right to travel also has interstate commerce implications. The chilling effect will dissuade people from travelling from mid-america states to border states, thus decreasing the flow of commerce and impairing the commercial viability of, for example, motels, restaurants, and gas stations along interstate routes. See Heart

of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348 (1964).

It is so well known that the Supreme Court has constantly rejected the notion that searches may be conducted without some underlying standard of cause that there is no need to cite authorities. Although probable cause is the standard normally required, the Court has made some carefully delineated exceptions. Camera v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727 (1967), Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). In the case at bar, the critical question is whether the Government's interest in preventing illegal entry of aliens is so great that we are willing to eliminate Fourth Amendment protections for the majority of our citizens.

In the recent Supreme Court decision, Almeida-Sanchez v. United States, 41 LW 4970, the Government argued that the unique problems connected with policing international travel justified searches without warrant and without probable cause under the auspices of

U.S.C. 1357(a). The Government was reminded, however, of the Supreme Court's former ruling that the word "automobile" is not a talisman in whose presence the Fourth Amendment faces away and disappears. Coolidge v. New Hampshire, 403 U.S. 443 at 461 (1971), 91 S. Ct. 2022 (1971). The Court held that the search of Petitioner's automobile by a roving patrol could not be justified on the basis of any special rules applicable to automobile searches, as probable cause was lacking. It further held that the search was not a border search or the functional equivalent thereof.

The Supreme Court left undecided the question crucial to the present case - whether searches at an established station (distant from?) near the border are functional equivalents of border searches and, if so, are they constitutional? We urge this Court, therefore, to rule on this question of such constitutional import. The same issues are at hand - the invidious discrimination and burden on the majority of our citizens of

having their freedom of movement greatly restricted without probable cause violating their constitutionally protected right of privacy - a rational distinction between the uniqueness of border searches for the illegal entry of aliens which permits border officials to whimsically conduct searches without cause and other contraband which requires some minimal standard of cause. Terry v. Ohio, supra - the lack of guidelines in distinguishing between detentions, interrogations and searches. It is the Judiciary's duty to be watchful for the constitutional rights of citizens and against any stealthy encroachments thereon. Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524 (1886).

IV

THE SEARCH OF PETITIONER'S PERSON RESULTING IN THE DISCOVERY OF A REGISTRATION SLIP AND TOW SERVICE LISTINGS FROM THE YELLOW PAGES OF A TELEPHONE BOOK CEMENTING THE CASE AGAINST HIM WAS VIOLATIVE OF THE FOURTH, FIFTH AND

NINTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Agent Bagley arrested and handcuffed a man hitherto unknown to him for towing a vehicle carrying marijuana. That person was clearly an untested unreliable informant in the toils of the law. He then claimed that Petitioner seen driving a 1972 green Pinto was the man responsible for his towing the vehicle. This was corroborated only by the fact that three miles along the crowded highway, Interstate 5, a car of the above general description was observed. Petitioner was immediately arrested and instantly searched resulting in the recovery of the only evidence linking him to the towed vehicle which housed the contraband. Clearly, there was insufficient probable cause for the search. See Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509 (1964); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968); Spinelli v. United States, 393 U. S. 410, 89 S. Ct. 584 (1969).

V

THE FACT THAT PETITIONER'S CAR WAS IN A STATE OF LIMITED BAILMENT MAKES THIS A CASE OF FIRST IMPRESSION AND JUSTIFIES THIS COURT'S UNDERTAKING TO DECIDE WHETHER THAT STATE OF BAILMENT PRECLUDED PETITIONER FROM OBJECTING TO THE SEARCH AND SEIZURE. THE DRIVER CONSENTED UNDER COERCION AND UNDER SUBMISSION TO AUTHORITY THEREBY RENDERING THE SEARCH INVALID.

In its brief opinion this Court stated that the fact that Petitioner's car was in a state of bailment precluded him from objecting to the search and seizure. It is settled law that one in use or possession of an automobile may give consent to search.

See People v. Bustamonte, 270 CA 2d 648, 76 CR 17 (1969). The fact, however, that the officials asked to inspect the trunk and when told by the driver that he did not have a key, replied that the driver would be detained until the trunk was examined, is a

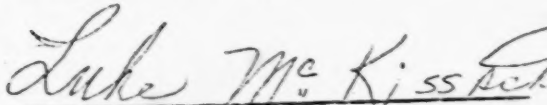
manifestation of the abuse of authority on the part of the officials to obtain consent. Certainly such consent is thereby rendered invalid. See Parrish v. Civil Service Commission, 66 C2 260, 57 CR 623 (1967).

The car was virtually torn apart in order to gain entry to the trunk. Neither the Trial Judge nor the Prosecutor urged any bailment and consented to search; yet the Appellate Court finds this unexplored issue determinative. This question calls for full review!

CONCLUSION

For the aforegoing reasons, the judgment should be reversed and the case dismissed.

Respectfully submitted,



LUKE McKISSACK
Attorney for Petitioner

APPENDIX

APPENDIX "A"

The Government's position requires that either the majority of the residents of our great nation be kept ignorant of the loss of their constitutional guarantees or commence a mass exodus to middle-America to reclaim them.* Dodge City may in truth again become the bastion of law and order. It would seem that such a mass evacuation of people seems unjustified by the whimsical need to maintain border checkpoints 100 miles away from our borders.

Refer to Illustration A for a graphic rendering of those persons potentially excluded from Fourth Amendment protections. The area outside of the heavy black line and within United States continental boundaries, represents the 100 mile "reasonable distance" zone set forth in 8 U.S.C. 1357 (a) and 8 C.F.R. 287.1(a)(2).

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* Of course, we exclude those solid citizens who may wish to exercise their Constitutional right to travel to coastal areas to gain employment, vacation or visit their relatives and friends.

APPENDIX "B"

RECEIVED AUG 15 1973

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. MIREE TOLBERT, JR., *Defendant-Appellant.*	No. 73-1941 ORDER OF AFFIRMANCE

[August 8, 1973]

Appeal from the United States District Court
for the Southern District of California

Before: CHAMBERS and KOELSCH, Circuit Judges, and LYDICK,* District Judge.

PER CURIAM:

The judgment of conviction is affirmed.

In our view, there was a bailment of the car that precluded the bailor from objecting to the search and seizure.

Bail is revoked.

*The Honorable Lawrence T. Lydick, United States District Judge for the Central District of California, sitting by designation.

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APPENDIX "C"

FILED

OCT 4 1973

CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docketed

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 73-1941
vs.	)	
MIREE TOLBERT, JR., Defendant-Appellant.	)	ORDER DENYING PETITION FOR REHEARING

Before: CHAMBERS and KOELSCH, Circuit Judges, and LYDICK, District Judge.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

All active judges have been notified of the petition, and none has voted for en banc.

Miree Tolbert Jr. is lodged in the San Diego City Jail, San Diego, Ca.

Pacific Time Zone
Mountain Time Zone
Central Time Zone
Eastern Time Zone
CANADA
MEXICO
Gulf of Mexico